No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

VS.

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF PROFESSORS OF LAW BARBARA BABCOCK, MICHAEL CHURGIN, WALTER E. DELLINGER, SANFORD LEVINSON, FRANK MICHELMAN, AVI SOIFER, AND ROBERT WEISBERG AS *AMICUS CURIAE*

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vs.

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Respondent

On Writ of Certiorari to the
Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Professors of Law Barbara Babcock, Michael Churgin, Walter E. Dellinger, Sanford Levinson, Frank Michelman, Avi Soifer, and Robert Weisberg As Amicus Curiae respectfully move the Court, pusuant to Rule 36.3, for leave to file

the attached Brief as amicus curiae in support of the Respondent.

1. Respondent has consented to this filing, but counsel for Petitioner refused to consent to the filing unless he was able to review the contents of the Brief, which proved impossible due to the time constraints involved, necessitating this Motion.

2. Amici are professors of constitutional law at five law schools in the United States. Barbara Babcock and Robert Weisberg are professors of law at Stanford Law School, Frank Michelman is a professor of law at Harvard Law School, Walter E. Dellinger is a professor at Duke University Law School, Michael Churgin and Sanford Levinson are professors at the University of Texas Law School, and Avi Soifer is a professor at Boston University Law School. Counsel

for amici is a professor of law at the University of Tennessee Law School.

3. Amici wish to file this brief to suggest to the Court that this case presents an issue more significant than whether the Court's decision in Booth v. Maryland, 96 L. Ed. 2d 440 (1987) was correct, namely whether it would be inadvisable for the Court to overrule Booth even if a majority of the Court now believes it was incorrectly decided, in view of the substantial risk that doing so would erode the Court's moral authority. Amici believe that serious consideration should be given to the larger consequences of any decision to overrule Booth, consequences which reach beyond the parameters of constitutionally permissible evidence and argument in a capital sentencing trial and implicate the reasons the Court's pronouncements

carry moral authority, namely that they are seen as arising from impartial and reasoned judgments. Amici submit that the conditions which permit the Court to overrule precedent without undermining its moral authority are not so clearly present that the Court can overrule Booth without creating a substantial risk of incurring such erosion.

DATED this 31st day of January, 1989.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PROFESSORS OF LAW BARBARA BABCOCK, MICHAEL CHURGIN, WALTER E. DELLINGER, SANFORD LEVINSON, FRANK MICHELMAN, AVI SOIFER, AND ROBERT WEISBERG AS AMICUS CURIAE

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INTEREST OF AMICI

The interest of amici is set out in the Motion accompanying this Brief.

SUMMARY OF ARGUMENT

The grant of certiorari to consider whether Booth misconstrued the require-

ments of the Eighth Amendment and was wrongly decided, apparently based on nothing more than a change in the Court's composition between the time of the Booth decision and now, is profoundly troubling, because it raises questions about the extent to which the Court is prepared to see respect for its authority undermined by the "precipitous overruling" of a precedent. It is generally agreed that stare decisis will permit the Court to overrule a prior decision which has come to be seen as erroneous if there have been significant intervening changes in society, its legal institutions, or in legal doctrine. Otherwise, particularly with regard to recently decided cases, overruling a precedent, except to correct the most egregious of errors, creates the appearance that the change has been occasioned by a change in the identity of

the identity of this Court's personnel. In a system that prizes stability and self-restraint in judicial decision-making, such a course would be counter-productive and would deprive the law of the basic discipline that legitimates it in the eyes of the public.

In the brief time since Booth was decided nothing has occurred that can justify overturning it. Even those Justices who disagreed with Booth have pointed to nothing in the result or the majority's opinion that is worse than an incorrect judgment call on a narrow issue about which views can reasonably differ. No major principle of constitutional law, having the potential to shape the growth of constitutional doctrine, is implicated in the debate between the majority and the dissent in Booth nor is there any large issue of governmental power or

direction that rides on the question of whether Booth is overruled; morever, there is no indication that Booth has been seen as such an aberration by the states that it has caused disruption in the administration of their capital sentencing schemes.

In short, the substantive issue in Booth is not important enough to warrant reversing the Court's position on it at the cost of the harm which such a reversal will do to the values of stare decisis, and the appearance that will be created that the identity of the Court's personnel is the key factor driving the decision to overrule.

ARGUMENT

Just two Terms ago, the Court held in Booth v. Maryland, 96 L.Ed.2d 440 (1987), that the Eighth Amendment precluded the consideration of "victim

impact" evidence in the sentencing process in a capital trial.[1] The decision was 5-4, and the controversy between the majority and the dissent was sharply defined and spirited.[2]

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1 The Victim Impact Statement introduced in Booth's trial included three distinct types of information: a description of the personal characteristics of the victim of the murder, a description of the emotional impact of the crime on the victim's family members, and the family members' opinions and characterizations of the crime and the defendant. 96 L.Ed.2d at 448.

2 The controversy centered on evidence of the emotional impact of the crime on the victim's family members. In the majority's view, the Eighth Amendment permits the defendant's moral culpability to be measured only in relation to his or her purposeful behavior. 96 L.Ed.2d at 449-50. Since the impact of the crime on the victim's family members is rarely known or in any way taken into account by the defendant when the crime is committed, from the majority's perspective, this evidence is generally irrelevant to the assessment of the defendant's moral culpability. Id. In the dissenters' view, the Eighth Amendment does not confine the assessment of moral culpability to the defendant's purposeful behavior. 96 L.Ed.2d at 457

One term ago, another Booth issue was presented in Mills v. Maryland, 100 L.Ed.2d 384 (1988). The issue was not decided because a majority of the Court held that the instructions at Mills' capital sentencing trial violated Lockett v. Ohio, 438 U.S. 586 (1978). Mills v. Maryland, 100 L.Ed.2d at 393-400. However, a dissenting opinion joined by four Justices expressed the view that Booth was wrongly decided and should be overruled. Id. 407-08 (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, J.J., dissenting).

(White, J., dissenting); id. at 459 (Scalia, J., dissenting). Because in their view, moral culpability includes responsibility for the harm inflicted by a murder, even if unintended, the Eighth Amendment does not preclude the sentencer's consideration of the impact of the crime on the victim's family members. 96 L.Ed.2d at 457 (White, J.); id. at 459 (Scalia, J.).

After Mills, it thus appeared that five Justices on the Court disagreed with the holding in Booth: Justice White, on the basis of his dissent in Booth; Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia, on the basis of their dissents in Booth and Mills; and Justice Kennedy, on the basis of his dissent in Mills. With the retirement of Justice Powell, who authored the majority opinion in Booth, and the appointment of Justice Kennedy as his successor, Booth no longer appears to have the support of a majority of the Court.

The grant of certiorari in Mr. Gathers' case has included the question whether Booth misconstrued the requirements of the Eighth Amendment and was "wrongly decided." The decision to take up this question, apparently based on nothing more than the change in the

Court's composition between the time of its decision in Booth and the present, is profoundly troubling. It feeds directly into "the existing cynicism that constitutional law is nothing more than politics carried on in a different forum." Monaghan, Stare Decisis and Constitutional Adjudication, 88 Columbia L. Rev. 723, 753 (May, 1988).

For this reason, we urge the Court to give serious consideration to the larger consequences of any decision to overrule Booth. These consequences reach beyond the parameters of constitutionally permissible evidence and argument in a capital sentencing trial and touch upon the very reason the Court's pronouncements carry moral authority: "public faith in the judiciary as a source of [impartial] and reasoned

judgments." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

Based on our analysis of the principles underlying stare decisis, the Booth decision, and the context in which the Court has taken up the question of whether to overrule Booth, we urge the Court not to overrule Booth, even though a majority of its members may support such a decision doctrinally. The conditions which permit the Court to overrule precedent without undermining its moral authority are not so clearly present that the Court can overrule Booth without creating a substantial risk of such erosion.[3]

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[3] In arguing against the overruling of Booth, we do not mean to suggest that the facts of the Gathers case call upon the Court to reach this issue. In fact, it appears that Gathers involves only a relatively minor aspect of the Booth decision. In Gathers, the issue was not whether to admit a Victim Impact Statement, but whether the

A. Stare Decisis Nurtures Public Faith In the Judiciary As A Source Of Impersonal And Reasoned Judgments

"'Very weighty considerations underlie the principle that courts should not lightly overrule past decisions'" Miller v. Fenton, 474 U.S. 104, 115 (1985), quoting Moragne v. States Marine Lines, Inc., 398 U.S. at 403. Stare decisis, "while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."

---

prosecutor could argue that certain aspects of the victim's character, his alleged religiosity and good citizenship, could serve as appropriate reasons for sentencing Mr. Gathers to death. While it is true that the majority opinion in Booth stated that it rejected the contention that the "victim's personal characteristics are proper sentencing considerations in a capital case," 96 L.Ed.2d at 451, we do not think that the Booth decision is properly read to exclude consideration of such characteristics when they were "known to the defendant before he committed the offense." Id. at 450.

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1982). The doctrine of stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals..." Vasquez v. Hillery, 474 U.S. 254, 265 (1986). See also Cardozo, The Nature of the Judicial Process 112 (1921) (adherence to precedent ensures impartiality).

While precedent is not a straitjacket, respect for precedent establishes the Court as the guardian of the laws, while disrespect for precedent undermines regard for the Court itself. As Justice Powell has put it: "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of ... precedents." Garcia v. San Antonio

Transit Authority, 469 U.S. 528, 559 (1985) (dissenting opinion). Thus, one commentator has noted that even when there has been a change in the composition of the Court, a dissenter in an earlier case may well hesitate to overrule the decision, fearing that "the Court's reputation will suffer if the doctrinal shift is perceived to be the result of nothing except altered membership." Kelman, The Forked Path of Dissent, 1985 Sup. Ct. Rev. 227, 264 (1985).

In general, stare decisis will permit the Court to overrule prior decisions which have come to be seen as erroneous only if there have been significant intervening changes in society, in legal institutions, or in legal doctrine. A precedent that has not stood the test of time may be overruled,

but it should first be given a fair chance to do so. Compare United States v. Miller, 471 U.S. 130, 144 (1985)(describing Ex parte Bain, 121 U.S. 1 (1887), as a case that "has simply not survived"), and United States v. One Assortment of Eighty-Nine Firearms, 456 U.S. 354 (1984)(recognizing that Coffey v. United States, 116 U.S. 436 (1886), had survived only as a source of doctrinal confusion), and Puerto Rico v. Branstad, 97 L.Ed.2d 187, 197 (1987)(noting that Kentucky v Dennison, 24 How. 66 (1861), was the "product of another time"), with Braswell v. United States, 101 L.Ed.2d 98 (1988)(reconciling Hale v. Henkel, 201 U.S. 43 (1906), and its progeny with Fisher v. United States, 425 U.S. 391 (1976)), and United States v. Powell, 469 U.S. 57, 63 (1984)(refusing to overrule Dunn v. United States,

284 U.S. 390 (1932), despite the demise of a part of Dunn's premises and noting that "this is not a case where a once-established principle has gradually been eroded by subsequent opinions of this Court"). As the Court explained in Vasquez v. Hillery,

> While stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932).... [E]very successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a greater objective.

474 U.S. at 266.

Thus, in Ford v. Wainwright, 477 U.S. 399 (1986), the Court put aside its

1950 decision in Solesbee v. Balkcom, 339 U.S. 9, in part because the Eighth Amendment had not been applied to the States at the time of Solesbee:

> Now that the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion. The adequacy of the procedures chosen by a State to determine sanity, therefore, will depend upon an issue that this Court [in Solesbee] ... never addressed ....

Id. at 405. And in Ake v. Oklahoma, 470 U.S. 68 (1985), the Court overruled U.S. ex rel Smith v. Baldi, 344 U.S. 561 (1953), explaining that

> [Baldi] was decided at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel. Our recognition since then of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has signaled our

> increased commitment to assuring meaningful access to the judicial process. Also, neither trial practice nor legislative treatment of the role of insanity in the criminal process sits paralyzed simply because this Court has once addressed them, and we would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today.

Id. at 85.

To be sure, while the Court has the inherent power to overrule its prior decisions -- and will do so "when convinced of former error," Smith v. Allwright, 321 U.S. 649, 665 (1944)-- that power is generally not exercised, because of the respect for law engendered by stare decisis, unless there has been an intervening change in law or legal practices such as those recognized in Ford and Ake.[4] For this reason, Justice

[4] See also Brown v. Board of Education, 347 U.S. 483, 489-95 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896).

Stevens has written, "I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity." Florida Dept. of Health v. Florida Nursing Home Ass'n., 450 U.S. 147, 153 (1981) (Stevens, J., concurring). To do otherwise, except to correct the most egregious of errors, is to create the appearance that a "sudden reversal[] of direction ... ha[s] been occasioned by nothing more significant than a change in the identity of this Court's personnel." Id. at 153.[5]

Because stare decisis requires more of the Court than simply "exploring the

[5] See J. Nowak, J. Young, and R. Rotunda, Constitutional Law 159-63 (1978) (criticizing the Court's decision in National League of Cities v. Usery, 426 U.S. 833, 853-55 (1976), to overrule Maryland v. Wirtz, 392 U.S. 183 (1968), on this basis).

precedents as possible models for current decision making," and because "[i]n some sense, the second court must feel bound by the precedent," Professor Monaghan has concluded that even if a precedent is clearly wrong, that factor should not be given much independent weight in deciding whether to overrule it. Monaghan, op. cit., supra, 80 Columbia L. Rev. at 755, 762. "[A]ny departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). The mere conviction that a prior case was erroneously decided is usually not enough to justify overruling it. See Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U. L. Rev. 19 (1983). For as the dissenting Justices explained in Vasquez v. Hillery, "Adhering to precedent 'is usually the wise policy, because in most

matters it is more important that the applicable rule of law be settled than that it be settled right.'" 474 U.S. at 269 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

In short, the rule of law requires adherence to precedents unless some stronger reason exists to overrule them than the belief -- however powerful-- that they were wrongly decided in the first place. This must be so in any system that prizes stability and self-restraint in judicial decision-making. For otherwise, the obvious desirability of reaching "correct" decisions on the merits and the natural tendency of any judge to identify "correctness" with his or her own views on the merits would deprive the law of the basic discipline that legitimates it. A question surely more important than "correctness" in

this sense is how much of the Court's rightful authority would survive if every 5-to-4 decision were overruled as soon as a majority Justice retired and was replaced by one who would have voted with the minority in the first instance.

B. There Is No Sufficient Basis For Overruling Booth v. Maryland

In the brief time since Booth was decided nothing has occurred that can justify a decision overturning it. Even those Justices who have disagreed with Booth have pointed to nothing in the result or the majority opinion that is worse than an incorrect judgment call on a narrow issue upon which reasonable views can differ. To the extent that the decisions of the lower courts since Booth shed light on the wisdom and practicality of Booth's resolution of the issue, there appears to be no reason for concern, much

less alarm. Under these circumstances, the case cannot be overruled without giving the appearance that the identity of the Court's personnel is the key factor driving the decision to do so.

Quite simply: the substantive issue in Booth is not important enough to warrant reversing the Court's position on it -- whichever position may be "right" -- at the cost of the harm which such a reversal will do to the values of stare decisis. Consider:

(1) That the views expressed by the dissenters in Booth do not demonstrate that the views of the majority were aberrations in the orderly development of constitutional doctrine. The analysis articulated by the dissenters was entirely reasonable, perhaps correct, and certainly entitled to prevail had that analysis commanded a

majority of the Court at the time Booth was decided. However, the dissenters' analysis cannot lay claim to a basis in precedent which allows it to be said that the majority analysis is out of touch with major doctrinal developments or established currents in the law. Cf. Ex parte Bain, supra; Coffey v. United States, supra. The difference between the majority and minority positions in Booth is no more than a disagreement over the way in which the particular question presented in that case should have been decided. The dissenters simply cannot call to their support any large constitutional principle with which the majority's position is in conflict. Accordingly, there are no "changes in society or in the law [that] dictate that the values served by stare decisis [should] yield in favor of a greater objective,"

Vasquez v. Hillery, 474 U.S. at 266, in this case.

(2) That Booth does not implicate any large issue of governmental power or direction. Despite Booth, the states can still punish the crime of murder with the penalty of death, utilize procedures for capital sentencing which permit individualized consideration of a defendant's moral culpability, and permit consideration in most cases of virtually all the evidence that any Justice might deem relevant on the issue of culpability. Booth excludes from the capital sentencer's consideration only a very narrow class of evidence whose relevance is at least reasonably debatable. In short, most capital prosecutions would be the same whether or not Booth had been decided. Accordingly, Booth has not in any substantial way

intruded upon the state's exercise of their legitimate powers under the Constitution.

(3) That no major principle of constitutional law, having potential to shape or deform the growth of constitutional doctrine, is implicated in the debate between the majority and the dissent in Booth. Booth involved a particularized application of two settled constitutional principles. While there were reasonable differences between the majority and the dissent over the particular application of these principles in Booth, these differences in no way involved any significant change in the articulation of the principles themselves.

The first principle called forward in Booth is one that was by then well-settled: the individualized selection of

those to be sentenced to death must turn upon an assessment of moral culpability. See Enmund v. Florida, 458 U.S. 782, 798 (1982); Tison v. Arizona, 95 L.Ed.2d 127, 143-45 (1987). While there have been disputes within the Court as to how moral culpability should be measured in particular cases, compare Tison v. Arizona, 95 L.Ed.2d at 143-45, with id., 95 L.Ed.2d at 151-54 (Brennan, J., joined by Marshall, Blackmun, and Stevens, J.J., dissenting), there has been no dispute that the inquiry into moral culpability is the heart of the quest. Indeed, there was no dispute in Booth; rather there was disagreement, as there can be in any particular case, over the application of the principle in that case.

The second principle called forward in Booth was also well-settled: to be reliable the capital sentencing process

must be protected against the influence of arbitrary and capricious factors. See, e.g., Zant v. Stephens, 462 U.S. 862, 884-85, 887 & n.27 (1983); Turner v. Murray, 476 U.S. 28, 36 (1986); Johnson v Mississippi, 100 L.Ed.2d 575, 584-85 (1988). All that was involved in Booth was a very narrow judgment call as to whether a particular kind of evidence fell on one side of this line or the other -- whether victim impact evidence was a relevant or an arbitrary and capricious factor in the assessment of moral culpability.

Accordingly, Booth simply did not involve the articulation of any large constitutional principle having the potential to shape or deform constitutional doctrine. It neither broke new constitutional ground nor declared a well-tilled field infertile. It does not

involve, therefore, the kind of shaping or mis-shaping of constitutional doctrine that may, in some cases, be worthy of intrusion upon the values protected by stare decisis.

(4) That Booth has not been seen as such an aberration that it has caused serious disruption in the administration of the states' capital sentencing schemes. Booth has been cited in a number of reported decisions, but there has been no indication that it has caused any difficulty for the administration of the states' criminal justice systems, nor has it led to wholesale reversals of sentences. Our research has revealed no case other than Gathers in which there was a reversal based on a finding of a Booth violation. In all other cases that we have examined, no Booth violation was found, it was held

that any Booth error was harmless, or there were procedural grounds to reject the Booth-based challenge. See, e.g., State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 108 S.Ct. 734 (1988); State v. Howard, 293 S.C. 462, 369 S.E.2d 132 (1988).

The plain truth is that the states have accommodated their practices to the mandate of Booth. No state has argued to the Court that Booth has created an imbalance in favor of the defendant in capital sentencing proceedings by its preclusion of victim impact evidence as evidence "counteracting the mitigating evidence which the defendant is entitled to put in...." 96 L.Ed.2d at 457 (White, J., dissenting). No state has filed an amicus brief in support of the petitioner in Gathers, for in truth, the states do not need to use victim impact

evidence to "even the score." The proper and sufficient counter to the defendant's mitigating evidence is for the prosecution to adduce evidence that the defendant's mitigating evidence and arguments are unworthy of belief or that they are exaggerated or defective in some other respect.

For all these reasons, there is no sufficient basis -- in the reasoning of Booth, in any disruption Booth has caused, or in any intervening change in law or society -- for the Court to overrule Booth.

CONCLUSION

Under these circumstances, if the Court overrules Booth it will do considerable damage to the moral fiber of the law. It will appear to be a decision occasioned by nothing more than a change in the Court's personnel. And while

capital cases may be thought to affect only a tiny group of citizens, the process of overruling Booth will signal a threat to all. As Justice Stevens so perceptively counseled,

> Citizens must have confidence that the rules on which they rely in ordering their affairs -- particularly when they are prepared to take issue with those in power in doing so-- are rules of law and not merely the opinion of a small group of men who temporarily occupy high office.

Florida Dept. of Health v. Florida Nursing Home Association, 450 U.S. at 154. We urge the Court to honor the rule of law by refusing to overrule Booth v. Maryland.

Respectfully submitted,

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